

AMERICAN GILSONITE CO.

IBLA 87-617

Decided September 19, 1989

Appeal from a decision by the Utah State Office, Bureau of Land Management, denying a protest to a preliminary Record of Decision to issue gilsonite prospecting permits in Uintah County, Utah. U-50245 etc.

Affirmed in part, reversed in part, and remanded.

1. Administrative Procedure: Generally--Rules of Practice: Generally--Rules of Practice: Appeals: Answers--Rules of Practice: Appeals: Extensions of Time

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

2. Regulations: Validity

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

3. Mineral Leasing Act: Generally--Mineral Leasing Act: Gilsonite Leases and Permits--Regulations: Validity

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined

Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adapted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

4. Evidence: Generally--Evidence: Preponderance--Mineral Leasing Act: Generally--Mineral Leasing Act: Gilsonite Leases and Permits: Generally

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

5. Evidence: Generally--Evidence: Preponderance--Mineral Leasing Act: Generally--Mineral Leasing Act: Gilsonite Leases and Permits: Generally

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by alleging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

6. Mineral Leasing Act: Gilsonite Leases and Permits: Workability--Words and Phrases

"Workability." Although the definition of "workability" concerns the extent of known deposits, the test of workability is dependent upon intrinsic economic factors, which take into account whether the value of extraction of the mineral is greater than the cost of its extraction.

7. Mineral Leasing Act: Gilsonite Leases and Permits: Workability

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. The fact that lands applied for adjoin other lands which contain known workable gilsonite deposits does not, alone, establish a geologic inference that the lands under application contain known workable deposits as well.

8. Evidence: Preponderance--Mineral Leasing Act: Gilsonite Leases and Permits: Workability

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, absent a showing of error by a preponderance of the evidence, the Secretary is entitled to rely upon the reasoned opinion of his technical experts. A mere difference of opinion will not establish such error.

9. Mineral Leasing Act: Gilsonite Leases and Permits: Applications

Where applications for prospecting permits filed prior to the effective date of authorizing regulations are not rejected by BLM, they may be cured by amendment, with priority established on the date amendments are filed. For the purpose of establishing priority, the amended applications are treated in the same manner as over-the-counter lease offers. If the filing of intervening applications prevents a determination of priority, the ambiguity should be remedied by simultaneous drawing.

APPEARANCES: Phillip Wm. Lear, Esq., and Mark Said, Esq., Salt Lake City, Utah, for appellant American Gilsonite Company; Robert G. Holt, Esq., Salt Lake City, Utah, for Hydrocarbon Mining, Inc.; Mitchell A. Lekas, Salt Lake City, Utah, pro se; David K. Grayson, Esq., Salt Lake City, Utah, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

American Gilsonite Company (AGC) appeals from a decision by the Bureau of Land Management (BLM) denying AGC's protest of a preliminary record of decision authorizing the issuance of prospecting permits for gilsonite. <sup>1/</sup>

Shortly after enactment of the Combined Hydrocarbon Leasing Act of 1981 (CHLA), P.L. 97-78, 95 Stat. 1070, effective November 16, 1981, companies interested in expanding their gilsonite mining operations began to file applications for prospecting permits for gilsonite with the Utah State Office. After issuance of Departmental regulations, effective May 22, 1986, providing for development of gilsonite located on Federal lands under a dual system encompassing both competitive leasing and the issuance of prospecting permits for veins of dubious workability, BLM prepared an environmental assessment and a technical review of outstanding permit applications. A preliminary record of decision issued on December 5, 1986.

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<sup>1/</sup> BLM has entered into an agreement whereby the word "gilsonite," is enclosed in quotations and capitalized due to the status of the word as a trademark. See 51 FR 15204, 15210, where the following comment is made:

"The trademark registration papers indicate that the trademarked term is for a commercial product rather than for ore in the [g]round as the Congress used the term in CHLA and in other statutes at least as far back as the Act of June 7, 1897 (30 Stat. 62, 87). The final rulemaking, when using the term 'Gilsonite,' capitalizes the word and sets it off in quotes to avoid controversy over the registered status of the term."

The word "gilsonite," is used in this opinion as a name for a vein or veins of solid hydrocarbon asphaltite located in and under the earth's surface, and is not used to describe any product which might be sold or distributed pursuant to commercial venture after it is extracted from the earth. As such, the word "gilsonite," is used herein in the same manner as any other word which connotes a mineral subject to the Mineral Leasing Act--i.e., oil, gas, quartz, or coal--and is therefore not enclosed in quotations and capitalized.

The preliminary record of decision approved 9,567.63 acres for prospecting, covering all or parts of 28 applications; and approved for competitive leasing the remaining 710.44 acres, which cover parts of eight prospecting permit applications. The four companies granted prospecting permits by the preliminary record of decision were American Gilsonite Company, Hydrocarbon Resources, Ziegler Mining Company, and Steven Malnar/Julius Murray.

On March 6, 1987, AGC filed a protest to the preliminary record of decision issued by BLM, challenging the authority of BLM to issue the permits, and claiming that applications for permits filed prior to May 24, 1984, are invalid. <sup>2/</sup> This protest was denied by decision of the Utah State Office issued on June 10, 1987. The preliminary record of decision became final on that date.

A notice of appeal to BLM's Final Decision of Record was filed with the Utah State Office by appellant on July 9, 1987. In conformity to 43 CFR 4.412, appellant filed a statement of reasons (SOR) on or before August 10, 1987. On October 5, 1987, appellant filed a supplement to the SOR. Mitchell A. Lekas filed a response to this supplement on

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<sup>2/</sup> On May 25, 1984, regulations were enacted by BLM providing for the leasing of Federal lands for purposes of gilsonite prospecting on a noncompetitive basis. See 49 FR 17892. On Apr. 12, 1985, those regulations were withdrawn and new proposed regulations were issued providing only for the competitive leasing of public lands for the recovery of gilsonite. See 50 FR 14512. Subsequent to submission of comments, the current regulations were proposed as final regulations on Apr. 22, 1986, and became final on May 22, 1986. AGC challenges the validity of the applications filed before the enactment of the May 25, 1984, regulations providing for the issuance of gilsonite prospecting permits.

October 22, 1987. On November 2, 1987, the Office of the Solicitor entered an appearance and filed a response to the supplemental SOR on behalf of BLM. On November 19, 1987, Hydrocarbon Mining Company (Hydrocarbon) entered an appearance and requested an extension of time within which to file an answer to AGC's appeal. Appellant has objected to Hydrocarbon's answer, claiming that it was not timely filed, and therefore should not be considered by the Board.

While the SOR contains eight points, issues raised by appellant may be distilled into five: whether an adverse party to an appeal before the Board may file an untimely answer; whether section 21 of the Mineral Leasing Act (MLA), as amended by CHLA, 30 U.S.C. § 241 (1982), grants the Secretary authority to issue prospecting permits to promote the mining of gilsonite; whether BLM's technical conclusions are reasonable and supportable with respect to lands to be opened to prospecting; and whether, even if applicable regulations are "duly promulgated," they have been misapplied, as all deposits of gilsonite, especially those in the Bonanza lithologic sequence, are known valuable deposits. Last, appellant argues that all applications for prospecting permits filed before May 25, 1984, the effective date of regulations officially opening public lands to gilsonite prospecting, are invalid because they were filed prematurely, and cannot be amended to reflect a filing date which would render them valid.

[1] Appellant argues that Hydrocarbon is foreclosed from filing an untimely answer pursuant to Departmental regulations which require the filing of an answer within 30 days subsequent to receipt of the SOR.

43 CFR 4.414. This regulation provides, in pertinent part, that "[i]f an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in [43 CFR] § 4.401(a)." 43 CFR 4.401(a) provides for a 10-day waiver of a filing deadline for documents required to be filed within a time certain under "this subpart," where the document was probably transmitted within the period in which it was required to be filed. Appellant asserts that this grace period is the only flexibility provided within Departmental regulations governing administrative appeal procedures with respect to late filings.

Departmental regulation 43 CFR 4.414 states that an answer may be disregarded when untimely filed. 43 CFR 4.22(f) provides that "[t]he time for filing \* \* \* any document may be extended by the Appeals Board \* \* \* before whom the proceeding is pending, except for the time for filing a notice of appeal and except where such extension is contrary to law or regulation." (Emphasis added.) In the context of this case, an answer is clearly "any document" with respect to which the Department has established a time for filing which may be extended, and, thus, authority to extend that time is available under the terms of 43 CFR 4.22(f).

We find no authority to support a conclusion that granting an extension of time for filing an answer is "contrary to law or regulation." The only document which is expressly excepted from 43 CFR 4.22(f) by law or regulation is a notice of appeal. That exception is found at 43 CFR

4.411(c), which provides, "No extension of time will be granted for filing the notice of appeal."

It might be argued that an extension of time for filing an answer is excepted from 43 CFR 4.22(f) because 43 CFR 4.414 mandates that an answer be filed within a certain time. However, the fact that a time is set for filing a document does not except that document from the operation of 43 CFR 4.22(f). The prime example of this is an SOR for appeal. Departmental regulation 43 CFR 4.412 provides that such a statement "shall [be] file[d] \* \* \* within 30 days after the notice of appeal was filed." Nevertheless, the Board has long granted extensions of time for filing SOR's. See Robert L. True (d.b.a. Comanche Enterprises), 101 IBLA 320, 324 (1988); Eloise Joyce Williamson, 50 IBLA 42, 43 (1980).

To date, the Board has not found any document to be excepted from 43 CFR 4.22(f) on the grounds that the granting of an extension was impliedly contrary to law or regulation. On the contrary, the only document found by the Board to be excepted is a notice of appeal, which is expressly excepted by regulation. See 43 CFR 4.411(c). We see no reason to change that approach now. Since we find no law or regulation which expressly prohibits the granting of an extension of time for the filing of an answer under 43 CFR 4.414, we conclude that such extension may be granted under 43 CFR 4.22(f).

Given that an extension of time within which to answer may be granted pursuant to 43 CFR 4.22(f), we must address the question whether such an

extension is appropriate in this case. Hydrocarbon entered an appearance on November 18, 1987, and requested an extension of time within which to answer, counsel having received copies of the Notice of Appeal, SOR, and Supplement to the SOR on November 16, 1987.

In its objection to Hydrocarbon's motion for extension of time within which to file an answer, appellant argues that Hydrocarbon did not maintain a current address with BLM, and appellant was unable to mail or forward the notice of appeal to a current address, but that Hydrocarbon probably received actual notice of the appeal on or about August 19, 1987, at its corporate offices in Midvale, Utah, by virtue of forwarding through the U.S. Postal Service. According to affidavit of Phillip Lear, corporate personnel of a parent company, Western Strategic Minerals, contacted appellant on or about October 12, 1987, and requested copies of pleadings, to be picked up by courier. Appellant states by affidavit that the documents were mailed to the offices of Western Strategic Minerals on October 27, 1987.

Thus, at worst, Hydrocarbon's motion for extension of time was filed approximately 90 days subsequent to receipt of actual notice; at best, it was filed within 40 days of Western Strategic's first contact with appellant's attorney, and 2 days after Hydrocarbon's attorney was informed of the appeal. In California Portland Cement Co., 40 IBLA 339 (1979), this Board held that an answer filed by BLM 28 days late would, in the exercise of the Board's discretion, be considered despite its tardiness. In that

case, the Board observed that appellant did not show it was adversely affected by the delay in the filing.

In this case, appellant filed a supplemental SOR on October 5, 1987, and a response was filed by BLM as late as November 2, 1987. Appellant filed replies to each of the responses to the supplemental SOR. On February 16, 1988, appellant filed a lengthy response, a document not specifically provided for by Departmental regulations, to Hydrocarbon's answer. As the answer was filed within a reasonable time in relation to all other pleadings filed, and as appellant has not shown any factual circumstance whereby the Board's consideration of Hydrocarbon's answer will adversely affect appellant, we are inclined to exercise our discretion in this case in a manner which will allow all relevant information before us to be considered. This approach is consistent with general principles of administrative law and procedure. See United States v. Victor Material Co., 67 IBLA 274, 276 (1982). Over appellant's objection, we therefore grant Hydrocarbon's motion for extension of time within which to file an answer, and consider all pleadings filed in the disposition of this case on the merits.

[2, 3] Appellant argues that the regulations lack statutory basis, in that section 21 of the MLA, as amended, does not provide for prospect-ing as a means of gilsonite development, and that regulations establish-ing a permitting system therefore are not "duly promulgated," and are

unconstitutional (SOR at 9, 10). 3/ The MLA, as amended by CHLA, appellant argues, mandates that development of gilsonite from public lands may only be achieved by competitive leasing. Additionally, appellant claims that all gilsonite deposits are known; therefore, the purposes of the MLA are best served by competitive leasing (SOR at 5, 26, 36, 38).

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department. Sam P. Jones, 71 IBLA 42 (1983); Enserch Exploration, Inc., 70 IBLA 25 (1983). While this Board has no authority to declare duly

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3/ Appellant cites Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981), in support of its contention that regulations authorizing the issuance of prospecting permits for gilsonite are not duly promulgated, and should be declared invalid. In that case the Board held that where a regulation "was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect." Id. at 30. As final regulations have so recently issued, appellant of course makes no argument that they have been ignored in actual practice. Neither does appellant allege procedural irregularities in the promulgation of the regulations authorizing prospecting permits for gilsonite. On the contrary, it is conceded that appellant was afforded an opportunity to be heard concerning regulatory changes. According to the SOR at page 4,

"On September 8, 1984, AGC filed its request for competitive bid affecting some, if not all, of the lands covered by the prospecting permits of Hydrocarbon and others. On April 12, 1985, the BLM withdrew the prospecting permit regulations and issued new proposed regulations. The new proposed regulations again established an all competitive leasing system. 50 Fed. Reg. 14512. AGC met with BLM officials in the Vernal District Office, Utah State Office, and in Washington, D.C., to provide industry input primarily on the issue of what is valuable and what is not a valuable mineral deposit for competitive bidding purposes. AGC offered much technical data which it thought would be helpful to the BLM in finalizing leasing regulations."

Appellant assumes that if the regulation has no statutory basis, this Board can declare the statute invalid, despite the facts that procedural protections were afforded during promulgation, and that the Department has no pattern of nonenforcement.

promulgated regulations invalid, we nevertheless address the question whether the Secretary has been granted discretion pursuant to 30 U.S.C. § 241 (1982) to issue regulations authorizing prospecting permits for gilsonite. Where Congress has delegated authority to administrative agencies to carry out legislative purposes, those agencies bear the primary responsibility of interpreting statutory language, and such interpretations are given deference by the courts. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984).

As appellant has raised the issue of whether BLM has authority under the MLA to issue prospecting permits for gilsonite, and as BLM has not heretofore addressed in detail the legal authority for its regulatory scheme, we would be remiss under 43 CFR 4.1 if we did not determine, "as fully and finally as might the Secretary" (id.), whether the MLA grants the Secretary discretion to institute a permitting system prior to issuance of leases for mining gilsonite. We address this issue in the interests of judicial economy as well, since our failure to do so could result in piecemeal litigation through subsequent motion practice and appeal. See 43 CFR 4.21(b), (c).

The MLA, 30 U.S.C. § 181 (1982), provides for the mining and development of certain minerals located on designated public lands through a permitting and/or leasing system. The Act authorizes the Secretary of the Interior to issue prospecting permits, exploration licenses, and noncompetitive and competitive leases to qualifying members of the private

sector in order to accomplish its purposes. <sup>4/</sup> Minerals subject to the MLA include coal, phosphates, oil and gas, oil shale, gilsonite and solid hydrocarbons, sodium, sulphur, and potassium. Id.

The Secretary of the Interior is the general manager of the public lands. Boesche v. Udall, 373 U.S. 472 (1963); United States v. Wilbur, 283 U.S. 414 (1931). In administering the MLA, the Secretary exercises a discretionary function. The MLA authorizes the Secretary "to prescribe necessary and proper rules and regulations" to accomplish its purposes. 30 U.S.C. § 189 (1982); Sam P. Jones, supra. It has long been recognized that the Secretary may, within the confines of the statute, create and operate a program designed to implement the provisions of the MLA. Joseph A. Talladira, 83 IBLA 256 (1984).

Inclusion of gilsonite within the MLA resulted from CHLA, in which Congress sought to encourage production of oil from tar sand and other hydrocarbon deposits. Prior to the 1981 amendments, both gilsonite and oil from tar sands had been governed by provisions set forth in section 21(a) and (c) of the Act, as amended on September 2, 1960, by P.L. 86-705, § 7, 74 Stat. 790, under the terms "native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried)." See 30 U.S.C. § 241(a) and (c) (1976).

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<sup>4/</sup> If we took appellant's argument to its logical extreme; that is, if the issuance of permits and leases is considered to be mutually exclusive, the very fact that the MLA is a leasing act would prohibit issuance of prospecting permits under the statute.

Gilsonite veins were first discovered in the Uinta Basin in 1869. In the 1870's and 1880's, discoveries were made in Duchesne County, Colorado. Discoveries, however, were not open to legal acquisition and mining under the Federal mining laws because the veins were located within Indian reservations. Early development of the mineral included a war between "trespassing prospectors and patrolling Indian agents" which lasted for over 20 years, until 1903. Appellant's Exhibit "A" at page 28, 5/ includes the following brief history of the development of the gilsonite industry:

In 1885 the substance was classified and named "Uintaite" by Professor Wm. P. Blake. However, in 1886 Samuel H. Gilson began to prospect the area and was successful in promoting a market for the new mineral, and a new name, "Gilsonite", was adopted in his honor by the people who later came to mine and market the mineral. At first gilsonite was merely a local name, later a trade name for the marketed substance, and finally it became the accepted technical name for this unusual mineral.

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In 1903 Congress passed an Act (Act of March 3, 1903; 3 Stat. 998, c. 994) which gave legal recognition to all trespassing "claims" located prior to 1891, and provided for a sealed bid sale of the mineral bearing tracts on the even-numbered sections of the reservations not covered by pre-1891 claims. Fortunately Congress provided a 90-day period during which the miners could re-record their claims in the local mining records. As a result a large number of claims \* \* \* probably discovered considerably after 1891, achieved legality and were subsequently patented.

Id.

In 1906, by proclamation, Theodore Roosevelt withdrew from acquisition and reserved all lands containing gilsonite not disposed of by 1910. Id. \_\_\_\_\_  
5/ SOR, Exhibit "A": Pruitt, Robert G., Jr., The Mineral Resources of Uintah County (Salt Lake City: Utah Geological and Mineralogical Survey, 1961), 23.

at 29. The Federal lands were thus closed to additional exploitation of gilsonite until September 2, 1960, when the MLA was amended to include "native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried)." 74 Stat. 790.

Technically, gilsonite is defined as "[a] solid pyrobitumen, an asphaltite, \* \* \* found in the Uinta Mountains of eastern Utah and in western Colorado[,] \* \* \* [occurring] in veins in Tertiary shales." "Asphaltite" is a harder, solid hydrocarbon with a higher melting point than asphalt. <sup>6/</sup> Historically, gilsonite could be claimed as a lode claim, and could be entered and patented "by means of the location of lode mining claims, \* \* \* [but not] by means of placer claims." Webb v. American Asphaltum Mining Co., 157 F. 203, 207 (8th Cir. 1907). As early as this 1907 opinion, a distinction was realized between "asphaltum," and "gilsonite." Gilsonite was recognized as a hard solid substance, whereas "asphaltum" could vary in its consistency from a liquid or semi-liquid to a hard or solid condition. Id. at 206.

The 1960 amendments to the MLA and initial regulations promulgated by BLM with respect to the leasing of gilsonite did not reflect these early technical distinctions, however. Statutory amendments did not mention gilsonite. Initial regulations, promulgated July 4, 1962, quoted the statutory amendment, which included the mineral within the category,

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<sup>6/</sup> Levorsen, A. I., Geology of Petroleum, 2d Ed. (San Francisco: W.H. Freeman and Company, 1967), at 675-79.

"native asphalt solid and semisolid bitumen and bituminous rock leases." Initial regulations provided that "[a]ll leases will be issued through competitive bidding \* \* \*." See 27 FR 6329; 43 CFR 203.2(d) (1963). Until 1970, regulations enacted pursuant to the MLA were generally classified by mineral, although, on March 31, 1964, regulations governing the leasing of native asphalt, solid and semisolid bitumen, and bituminous rock were simply classified under "Asphalt Leases." See 29 FR 4547; 43 CFR 3190 (1965).

On June 13, 1970, regulations promulgated pursuant to the MLA were reorganized, and all minerals other than oil and gas were grouped into 43 CFR 3500. While 43 CFR 3521.2-2 classified "asphalt" as a hard-rock mineral, asphalt leases were issued under the provisions of 43 CFR 3120, relating to competitive leasing for oil and gas. See 43 CFR 3521.2-2(c)(3)(i)(b) (1972). Asphalt--hence, gilsonite--was competi-tively leased under the same procedures as were oil and gas until April 25, 1984, when preference right leasing was provided for gilsonite pursuant to 43 CFR 3520.2-1(b) (1984), and prospecting permits were authorized for any solid MLA mineral, other than coal and oil shale, under the MLA. 7/

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7/ 43 CFR 3520.1-1(a) (1984) provided that:

"The authorized officer shall, upon application, issue a lease to the holder of a prospecting permit for any leasable mineral or hardrock mineral if the permittee shows that, within the term of the permit, he/she discovered a valuable deposit of the mineral for which the permit was issued, and in the case of potassium, sodium and sulphur applications, if the land is chiefly valuable for said mineral." 43 CFR 3511.3-1(a) (1984) provides that gilsonite prospecting permits may be extended for a period of 2 years. Although not specifically stated, under the 1984 regulatory amendments, a prospecting permit could apparently issue for any solid mineral under the MLA other than oil shale and coal. See 43 CFR Subpart 3511 (1984).

On April 12, 1985, a regulatory scheme was proposed which again provided for mineral-specific sections pertaining to solid minerals other than coal or oil shale. 50 FR 14512 (Apr. 12, 1985). In that proposed rulemaking, the noncompetitive leasing provisions for gilsonite were replaced with an all competitive system. According to the Federal Register, the proposed regulations were subject to an approximate 3-month comment period. During the comment period, BLM received five comments pertaining to the competitive leasing of gilsonite deposits. As a result of these comments, the prospecting permit/preference-right lease system for gilsonite was reinstituted, and became effective on May 22, 1986. See 51 FR 15210 (Apr. 22, 1986). The rationale for adoption of the permit/preference-right system was explained by BLM as follows:

The proposed rulemaking provided for [an] all competitive leasing program for "Gilsonite" because of the assumption that all "Gilsonite" deposits were already known. Although most of the unleased Federal lands in the Uintah Basin near Bonanza, Utah, embrace known deposits of "Gilsonite," the comments received \* \* \* indicate that there are other lands in Utah and Colorado which may contain "Gilsonite" deposits, but exploratory work is needed to determine their existence and workability. For this reason, the prospecting permit/preference right lease system used in other sections of the proposed rulemaking is being reinstituted by the final rulemaking in the revised part 3550.

Id.

The regulatory scheme, summarized at 43 CFR 3550.1, entitled "Leasing procedures," provides as follows:

The regulations in this part provide the procedures for qualified applicants to obtain rights to develop deposits of "Gilsonite," found on lands available for leasing. The regulations provide for this in the following manner:

(a) "Prospecting permits" allow the permittee to explore for deposits of "Gilsonite".

(b) "Preference right leases" are issued to holders of prospecting permits who demonstrate the discovery of a valuable deposit of "Gilsonite" under the permit.

(c) "Exploration licenses" allow the licensee to explore known deposits of "Gilsonite" to obtain data but do not grant the licensee any preference or other right to a lease.

(d) "Competitive leases" are issued for known deposits of "Gilsonite" and allow the lessee to mine the deposit.

(e) "Fringe acreage leases" are issued noncompetitively for known deposits of "Gilsonite" adjacent to existing mines on non-federal lands which can only be mined as part of the existing mining operation.

(f) "Lease modifications" are used to add known deposits of "Gilsonite" to an adjacent Federal lease which contains an existing mine provided the deposits can only be mined as part of the existing mining operation.

Other minerals under the jurisdiction of the MLA are subject to a variety of development schemes. For example, the Act provides for the issuance of both exploration licenses and leases to encourage the development of coal deposits. 30 U.S.C. § 201 (1982). Lands containing phosphate deposits may be leased by "competitive bidding, or other such methods as [the Secretary] may by general regulations adopt." 30 U.S.C. § 211(a) (1982) (emphasis added). 30 U.S.C. § 211(b) (1982) further provides:

Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in

any unclaimed, undeveloped area, the Secretary \* \* \* is authorized to issue, \* \* \* a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years; \* \* \* and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

Similar provisions granting the Secretary authority to issue prospecting permits for exploration, preference-right leases upon discovery of valuable deposits, and finally, competitive leases where lands contain known valuable deposits, are specifically included in the MLA for sodium (30 U.S.C. §§ 261, 262 (1982)), sulfur (30 U.S.C §§ 271-273 (1982)), and potassium (30 U.S.C. §§ 281-283 (1982)).

With respect to oil and gas, the Act of 1920 authorized the issuance of a permit for prospecting on areas not situated within a known geologic structure of a producing oil or gas field, with a preference right, upon discovery of oil or gas, to lease the acreage. 41 Stat. 437. The Act of August 21, 1935, 49 Stat. 674, significantly altered provisions for development of oil and gas located on Federal lands, by providing for an all-leasing system, thus eliminating prospecting permits. See Anne Burnett Tandy, 33 IBLA 106 (1977). Most recently, by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), P.L. 100-203, 101 Stat. 1330-260, §§ 5101-5113, 30 U.S.C. § 226 (West Supp. 1989), Congress has expressed its will that Federal oil and gas deposits shall be developed only through competitive leasing, without regard to whether deposits are within a "known geologic structure," as had been the case since 1935.

To encourage the development of oil from tar sands in 1981, Congress enacted the CHLA, which placed all hydrocarbons recoverable from tar sands under section 17 of the Act (30 U.S.C. § 226 (1982)) governing oil and gas leasing, and redefined the minerals to be included under section 21 (30 U.S.C. § 241 (1982)) as "gilsonite (including all vein-type solid hydrocarbons)." In support of the amendment, H.R. 3975, Representative Santini of Nevada stated on the date of its passage that

[t]he concept of a combined hydrocarbon lease has been under consideration by the administration and Congress for several years. H.R. 3975 would include all hydrocarbons in one lease, with the exception of gilsonite, oil shale, and coal. The latter three are easily distinguishable and would remain under section 21 and section 2 of the Mineral Leasing Act. [Emphasis added.]

127 Cong. Rec. 15651 (1981) (statement of Rep. Santini).

Thus, to the extent the 1960 amendments to the MLA and implementing regulations may have harbored ambiguity concerning how gilsonite was to be developed, the Hydrocarbon Leasing Act of 1981 left no doubt that Congress intended to include gilsonite within the MLA, but to exclude it from the leasing scheme set by section 17 for oil and gas. The intent was to segregate tar sand hydrocarbons from other section 21 minerals (including gilsonite), by allowing oil and gas developers to lease the tar sand minerals in combination with other oil and gas interests. Therefore, to the extent that appellant argues that the MLA requires gilsonite to be

leased in a manner like oil and gas, we find no basis in the Act for this restrictive interpretation. 8/

Section 21 of the MLA, 30 U.S.C. § 241 (1982), provides, in pertinent part:

The Secretary of the Interior is hereby authorized to lease to any person or corporation qualified under this chapter any deposits of oil shale, and gilsonite (including all vein-type hydrocarbons) belonging to the United States and the surface of so much of the public lands containing such deposits, or land adjacent thereto, as may be required for the extraction and reduction of the leased minerals, under such rules and regulations, not inconsistent with this chapter, as he may prescribe.

In Daniel A. Engelhardt (On Reconsideration), 62 IBLA 93, 97, 89 I.D. 82, 85 (1982), this Board set aside a prior decision ordering a hearing into whether BLM correctly denied a noncompetitive lease offer because the land was within a known geologic structure. Holding that, since the land was within a special tar sand area, CHLA left BLM no discretion to noncompetitively lease the disputed tract, the Board stated: "Ultimate control of the disposition of public lands and resources belongs to Congress, and the responsibility of the Interior Department is to administer them in accordance with the dictates of the legislative branch."

Prior to removal \_\_\_\_\_

8/ That this usage was intended by Congress in CHLA, is indicated by legislative history, which notes:

"Section 3 adds the phrase 'gilsonite (including all vein-type solid hydrocarbons),' to section 39 of the Mineral Lands Leasing Act. Gilsonite is added to those sections of the Mineral Lands Leasing Act with general applicability to assure that gilsonite lessees will have the same rights and responsibilities as other mineral lessees."

See 1981 U.S. Code Cong. & Ad. News (97th Cong., 1st Sess.) 1740, 1744.

of the tar sand areas from section 21 of the MLA, BLM had historically exercised its discretion to make known geologic structure determinations for tar sand areas, even though section 21 did not specifically grant the Secretary the authority to do so.

The question before us, then, is whether Congress, by not specifically authorizing prospecting permits for gilsonite, has dictated that such permits may not be issued by the Secretary; or, does the MLA grant the Secretary discretion to implement a regulatory scheme other than, or in addition to, competitive leasing for the development of Federal gilsonite reserves?

While the Act specifies systems to be used to develop particular minerals, the Secretary nonetheless has been granted wide discretion in its implementation. In Boesche v. Udall, supra, the U.S. Supreme Court held that the Secretary of the Interior, under his general powers of management over the public lands, has authority to cancel a lease administratively for invalidity at its inception, unless such authority was withdrawn by the MLA. We find no authority which persuades us that Congress intended to withdraw from the Secretary the discretion to establish a permitting scheme preliminary to the leasing of gilsonite if he chose to do so. While gilsonite has been competitively leased since its inclusion under the MLA, we find no statutory strictures that would limit the Secretary to such a procedure.

This Board considered the question of when a regulation enacted by the Department is without the scope of statutory authority granted by

Congress in Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985). In that case, we considered the impact of Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), pertaining to Federal statutes awarding attorney's fees, upon section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and implementing regulations, 43 CFR 4.1290-4.1294 (1984), as enforced by the Office of Surface Mining Reclamation and Enforcement (OSMRE). The Board determined that OSMRE's regulatory scheme was inconsistent with the statutory authorization for payment of attorney's fees as interpreted by Ruckelshaus. As the standard for award set forth in 43 CFR 4.1290-4.1294 was broader than the statutory limits enunciated in Ruckelshaus, we declined to apply the regulatory standard, thereby denying an award to appellants. Thus, Donald St. Clair requires that a regulatory scheme must not be broader than the statutory limits, and must be otherwise consistent with statutory provisions as they have been interpreted by the courts.

Section 241 grants the Secretary the authority "to lease \* \* \* gilsonite \* \* \* belonging to the United States \* \* \* under such rules and regulations, not inconsistent with this chapter, as he may prescribe." (Emphasis added.) Congress has therefore deferred to the Secretary's discretion in the implementation of statutory provisions for the leasing of gilsonite. Our review of the overall statutory framework of the MLA leads us to conclude that regulations permitting prospecting prior to lease issuance in order to determine the workability of gilsonite veins are not inconsistent with any provision of the MLA, nor are they broader than the statutory limits defined by the courts.

Appellant argues that the MLA indicates a preference for competitively leasing all known mineral deposits. The regulations in effect support this assertion. 43 CFR 3555.1 provides, in pertinent part:

Lands available for leasing that have surface and/or subsurface evidence to reasonably assure the existence of a valuable deposit of "Gilsonite" may be leased only through competitive sale \* \* \*. A competitive lease sale may be initiated either through an expression of interest or on Bureau motion.

The permitting procedure is aimed at those deposits which might not be explored for development due to their questionable workability. 43 CFR 3552.1 sets forth the areas subject to prospecting as follows:

A prospecting permit may be issued for any area of available public domain or acquired lands subject to leasing where prospecting or exploratory work is necessary to determine the existence of or workability of "Gilsonite". Discovery of a valuable deposit of "Gilsonite" within the terms of the permit entitles the permittee to a preference right lease.

Insofar as the regulatory scheme establishes a system of permitting based upon workability, and competitive leasing based upon reasonable assurance of an existing valuable deposit, it is consistent with statutory provisions which pertain to prospecting permits, and is therefore not inconsistent with the provisions of the MLA. See 30 U.S.C. § 211; 30 U.S.C. §§ 261, 262; 30 U.S.C. §§ 271-273; and 30 U.S.C. §§ 281-283 (1982).

Appellant would have the Board declare the regulations invalid because the regulations do not specify that all gilsonite deposits in Bonanza,

Utah, are known. The MLA has vested the Secretary with discretion to choose a regulatory scheme, not inconsistent with the Act, for the management of the development of gilsonite located upon Federal lands. Our review supra of the promulgation of 43 CFR 3500 leads us to conclude that 43 CFR 3500 was "duly promulgated," and that appellant was provided and availed itself of the opportunity to be heard during the promulgation process (see note 3, supra). That an affected citizen disagrees with duly promulgated regulations does not endow this Board with authority to declare them invalid. Regulations reasonably adapted to the administration of a congressional act, and not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such invalid. General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); St. Scholastica Academy, 40 IBLA 175 (1979); Sam P. Jones, supra.

[4, 5] Appellant argues that "BLM has drawn geological conclusions and inferences in its Technical Mineral Report which are not reasonable or supportable" (SOR at 19). Appellant quarrels with BLM's criteria for determining when gilsonite veins will be subject to competitive leasing, and when explorers will be permitted to prospect for gilsonite. Appellant claims that BLM's determination that an 18-inch or greater surface width is necessary for a competitive lease is not consistent with knowledge in the industry concerning whether a valuable deposit exists (SOR at 20-21). AGC contends that BLM has determined that lands "containing Gilsonite outcrops appearing within one-quarter mile from existing veins in the Bonanza System are to be leased competitively while lands containing outcrops in excess of one-quarter mile from existing veins in the Bonanza System are to be leased

noncompetitively" (SOR at 20), and that this one-fourth-mile standard is a known criterion for coal, and is not a sound standard upon which to judge whether a gilsonite vein is workable for purposes of competitive leasing. Id. According to AGC, the standard should be "projectability based upon one-half the distance of known reserves, adjusted by recently gathered data which would affect projectability" (SOR at 23).

Appellant admits that

[s]uch an inference would project the vein substantial distances beyond one-quarter or even one-half mile. It would effectively remove the great bulk of land designated available to prospecting permitting and include it within lands which by regulatory definition should be subject to leasing only.

Id. Appellant charges that BLM's use of a one-half mile interval from a known vein in the Cottonwood System to justify a preference-right lease is not supportable in fact, as mining companies have drilled one-half-mile holes not to explore for gilsonite in the Cottonwood System, but to mine it (SOR at 21). Appellant argues that there is inconsistency between the technical report and the flow chart, as the technical report establishes a one-half-mile interval of lateral continuity for veins greater than 18 inches wide located in the Bonanza sequence in order to lease these veins competitively, yet the flow chart shows a one-quarter-mile lateral continuity (SOR at 25).

Appellant has submitted an affidavit by Robert Haffner, president of AGC. Haffner states that AGC has profitably mined gilsonite veins of 15-inch thickness, that AGC would consider the mining of veins in the

"northwest end of the Gilsonite vein system in the Uinta host formation [that are] less than eighteen (18) inches in thickness to be prudent and economic" (Haffner Affidavit at 2), and that since the existence of gilsonite veins is reasonably well known, "no additional prospecting is necessary to establish the existence or workability of deposits." Id.

BLM's technical report was prepared by a staff geologist for the Bookcliffs Resource Area. The report is based largely upon geologic considerations, as evidenced by the following excerpt:

An evaluation of the type rock encompassing the gilsonite, also termed host rock, was one factor considered in our geologic analysis. Two lithologic or rock sequences were identified in the Uintah and Green River formations within the general area encompassing the applications. One is in the Bonanza area where eight applications (termed the Bonanza group on Map 1) are located. \* \* \* Here the subsurface sedimentary sequence is dominated by thick intervals of sandstones. This is simply termed a Bonanza lithologic sequence for purpose of this report. I observed such a thick sandstone sequence in an American Gilsonite Company's mine on the Little Emma vein, Federal Lease U-126938 (only 1/2 mile from application area U-54591). Gamma ray logs from seven oil and gas wells in this area show thick sequences of nonshale rock units. The fact [that] the Bonanza area is the only location with operating gilsonite mines is an indication of the favorable mining conditions which exist there.

The lithologic sequence changes characteristics considerably to the southwest and west of Bonanza becoming a more interbedded siltstone and marlstone deposit. Sandstone units in the area are substantially thinner and discontinuous than in the Bonanza area. This is termed a Cottonwood lithologic sequence. The remaining applications are within a wide area influenced by this lithologic sequence and fall into five geographic groups. The Canyon Country, Cottonwood, Natural Buttes, Upper Willow Creek and Lower Willow Creeks groups are shown on Map 1. There are no operating gilsonite mines in this area. The only information available from any of the past mining operation in this area is contained in a report by Hydrocarbon Mining Inc. (Lekas, 1986). The report describes and illustrates the erratic nature of the gilsonite encountered in the company's four inactive mines. \* \* \* The report did not include mine specific description of host rock

lithologies. Fifteen gamma ray logs from oil and gas wells in this large area were evaluated and show no consistently [sic] thick favorable host rock sequences that are present in a Bonanza sequence.

(Technical Mineral Report at 1-2).

The report states that "[t]he host rock type and thickness is very important in our evaluation," and concludes that

The northwest trending of the gilsonite veins was caused by fracturing (as a result of tension) of the rocks in the Uinta Basin. The thick sandstones in the Bonanza area represent the best confining or host rock for gilsonite since it fractured uniformly. Being a competent rock, the fractures stayed open and where the conditions were right, were filled with gilsonite. The fracturing within the sedimentary rocks of the Cottonwood Depositional Environment occurred in rocks of varying competence. While the thin sandstones might hold open after fracturing, the less competent rocks (especially shales and marlstones) would close the fracture by flowing under pressure into the void. The brittleness of the marlstones could cause the fracturing mechanism to create a zone of brecciation [sic] instead of open space. Both scenarios within a Cottonwood Sequence lessens the economic potential of the acreage.

Id.

BLM's geologist determined that, in the richer Bonanza area, proximity to measured underground occurrences of mineable gilsonite would be a deciding factor in determining whether the application was to be considered for prospecting. "Due to the lithologic sequence in the Bonanza area," if an underground measurement was greater than 18 inches, a one-half-mile projection beyond the last gilsonite measurement was made. Id. at 2-3. In the Cottonwood lithologic sequence,

a more consistent (mineable) gilsonite width along a strike (of the vein) of 2640 feet or greater was considered in excluding portions of the application areas. A projection of 1/4 mile (1320 feet) past the last measured gilsonite mineable width was made if the geologic data was sufficient to make such an extension. The continuity of width along the strike length of a mineable gilsonite vein was considered since the gilsonite may not be consistent (in width) downward in keeping with the variability of the rock types in the Cottonwood lithologic sequence. In this area the gilsonite may be mined by a method other than the conventional underground method utilized on federal leases in the Bonanza area. On these federal leases a surface pillar is left in place. In the case of the Cottonwood type depositional environment leaving such a pillar may not be economic. Extensive surface mining of gilsonite by trenching occurred to the southeast of the Canyon Country group and to a limited extent at Hydrocarbon's Midas mine in Section 26, T. 9 S., R. 21 E. Portions of lands under applications U-50248, U-50250, U-54593, U-54594, and U-54970 are recommended for exclusion based upon the above criteria.

Id. at 3.

Appellant's assertions that BLM's geologist adapted criteria used to determine workability of coal resources are grounded in the final paragraph of the Technical Mineral Report, where the following comment is made:

A note should be made concerning projections made past mineable widths of gilsonite. There is no published information regarding calculations of gilsonite resources (i.e., measured, indicated, inferred). Some gilsonite companies have submitted plans to explore for gilsonite by one drill hole per half mile. Companies have done such drilling in advance of mining operations. Therefore, as similar to coal, a 1/4 mile distance from a known width would yield a measured resource and a 1/2 mile distance would be an indicated resource. A 1/2 mile projection was made from a measured laterally continuous mineable width in the Bonanza area due to the geologic conditions, (i.e., the continuation of a mineable width of the fracture filling gilsonite farther along strike is reasonably assured). In the Cottonwood lithologic sequence areas a 1/4 mile projection (if applicable) was made from a laterally continuous mineable width due to the geologic

uncertainty of the lateral extent of a favorable host rock for the gilsonite.

Id.

Attached to the Technical Mineral Report is a "gilsonite acreage flow chart." The chart divides the acreage into Bonanza and Cottonwood host rock determinations, and lists the criteria to be used in BLM's determination as to whether the acreage in each lithologic sequence should be competitively or noncompetitively leased. According to the flow chart, a surface vein of less than 18 inches will be noncompetitively leased in both the Bonanza and Cottonwood lithologic sequences.

In the Cottonwood sequence, if the surface vein is greater than "eighteen inches thick," <sup>9/</sup> a lateral continuity of this thickness for greater than 2,640 feet (one-half mile) will yield a competitive tract, if the number of surface measurements for geologic interpretations is sufficient. The boundary of the competitive lease, if awarded, will extend 1,320 feet (one-quarter mile) past the last known point greater than 18 inches thick. If the lateral continuity of the 18-inch thick vein is not greater than 2,640 feet, the vein will be subject to prospecting. If the lateral continuity of the 18-inch thick vein is greater than 2,640 feet, but surface measurements for geologic interpretations are

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<sup>9/</sup> From context we assume that "18 inches thick" refers to a measurement taken on the surface of the ground which actually yields what would commonly be referred to as width, as opposed to length or depth. Likewise, we assume "lateral continuity" means length.

deemed by BLM to be insufficient, the vein will be permitted for prospecting. The chart indicates that, in the Bonanza sequence, if the lateral continuity of the vein measuring 18 inches thick is greater than 1,320 feet, the tract will be competitively leased.

The Technical Mineral Report is an evaluation, based upon geological considerations, of the extent of known gilsonite deposits for purposes of deciding whether to issue prospecting permits or competitive leases. As such, the report is similar to geologic analyses conducted in a variety of other contexts where determinations of known mineral deposits must be made. Such appraisals are used to determine whether phosphate deposits are sufficiently workable to justify competitive leasing. Elizabeth B. Archer, 102 IBLA 308 (1988); Earth Sciences, Inc., 80 IBLA 28 (1984). Prior to passage of FOGLRA, geologic analyses were routine in the context of Federal oil and gas leasing to assess whether lands were within "known geologic structures," and thus subject only to competitive leasing. See Jack J. Grynberg, 104 IBLA 51 (1988); Robert E. Eckels, 104 IBLA 28 (1988); Carolyn J. McCutchin, 103 IBLA 1 (1988); Richard E. O'Connell, 98 IBLA 283 (1987). In Daniel A. Engelhardt, *supra*, this Board ordered a hearing where designated tar sands areas in eastern Utah were classified within a known geologic structure, and Engelhardt had submitted an affidavit by an independent consulting geologist that refuted BLM's geologic conclusions.

In Clear Creek Inn Corp., 7 IBLA 200 (1972), with respect to a BLM determination concerning whether coal lands were of such character to

subject them to leasing rather than prospecting under permits, this Board held that,

we recognize that the Geological Survey in conducting its field examinations and collection of other data is acting as the Secretary's expert and is providing technical advice so that a proper determination can be made in these matters. \* \* \* [W]hen the Geological Survey has concluded from all the available geological data that further exploration is, or is not, needed to determine the existence or workability of coal deposits in a particular area, the Secretary is entitled to rely upon the reasoned opinion of his technical expert in the field. [Citations omitted.]

Id. at 213-14.

While this Board has not heretofore addressed what will be sufficient to justify a conclusion by BLM concerning whether a prospecting permit or a lease should issue with respect to gilsonite, we see no reason to depart from standards developed through cases involving other minerals where similar issues have been raised. It is well settled that the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff. Robert E. Eckels, supra; Wilfred Plomis, 104 IBLA 34 (1988).

Where, however, BLM has provided insufficient documentation, or relies on unsupported documentation of a conclusory nature, a challenge

may be successfully pursued. See Petex, Inc., 104 IBLA 72 (1988). In order to prevail, an appellant must establish error on the part of BLM by a preponderance of the evidence. Richard E. O'Connell, *supra*; Carolyn J. McCutchin, 93 IBLA 134 (1986); see Bender v. Hodel, 744 F.2d 1424 (10th Cir. 1984). The "preponderance of the evidence" standard has been defined as:

[Establishing] \* \* \* that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, [that] has [the] more convincing force and produces in your [mind the] belief that what is sought to be proved is more likely to be true than not true.

Thunderbird Oil Corp., 91 IBLA 195, 201 (1986), *aff'd sub nom.*, Planet Corp. v. Hodel, CV No. 86-679 HB (D.N.M. May 6, 1987), *quoting* South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 778 (6th Cir. 1970).

Appellant has attempted to show error in the Technical Mineral Report by alleging inconsistency between the report and the flow chart, by alleging that BLM has used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choice of standards for competitive leasing are not based in fact. In support of its contentions, appellant has submitted no proof other than an affidavit by its president, which does not show that it is founded on geologic analysis. Moreover, this affidavit is refuted by two letters filed by Mitchell A. Lekas, who concludes that "there is no reasonable assurance

that narrow veins exposed on the surface will increase in width at depth to a mineable thickness." (Emphasis in original.) 10/

We do not find that appellant has shown inconsistency between the mineral report and the flow chart. Appellant assumes that the chart has limited a competitive lease in the Bonanza sequence to one-quarter mile past the last known 18-inch point, and is thus inconsistent with the report. Appellant's analysis, however, confuses the one-quarter-mile lateral continuity referenced in the chart underneath the "Bonanza host rock determination," with the one-half-mile leasing distance for the Bonanza sequence mentioned in the mineral report.

The flow chart indicates that a one-quarter-mile lateral continuity for an 18-inch surface gilsonite width will support a competitive lease in the Bonanza sequence, whereas one-half mile, in addition to sufficient surface measurements, is required for competitive leasing (for an 18-inch surface width) in the Cottonwood sequence. Thus, in the richer Bonanza lithologic sequence, the length of vein required for competitive leasing will be one-half that required for a competitive lease in the Cottonwood sequence.

Admittedly, the chart does not include lease area standards for the Bonanza lithologic sequence, which, according to the mineral report, are one-half mile, assuming a vein thickness greater than 18 inches for a

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10/ Letter to the Board from Mitchell A. Lekas, dated Nov. 16, 1987. While not in affidavit form, both Lekas correspondences generally support the Lekas report referenced in the Technical Mineral Report.

distance (lateral continuity) greater than 1,320 feet (one-quarter mile). Thus, the chart could be completed by adding the words, "(extended 2640' past last known point >18" thick)" underneath the word "competitive," listed on the right hand side of the chart, which sets forth leasing criteria for the Bonanza host rock formation. This omission, however, does not produce an inconsistency, nor does it render the report or the chart meaningless. It cannot be said to constitute fatal error to BLM's geologic conclusions.

Appellant has emphasized the similarity of BLM's geologic analysis to that applied in coal leasing. Appellant has not cited specific BLM regulations or policies to buttress its allegations, other than those referenced in the technical report itself. Taking appellant's argument in its most favorable light, we cannot, on this basis alone, find fault with BLM's geologic conclusions. Appellant fails to show that these acknowledged similarities have undermined or created error in BLM's geologic analysis.

Appellant has advanced its own standard for competitive leasing: "projectability based upon one-half the distance of known reserves, adjusted by recently gathered data which would affect projectability" (SOR, supra). No geologic report or evidence has been presented, however, which establishes the conclusions of BLM as geologically unsound, and supports appellant's standard as geologically sound. Relying generally on Pruitt's report (see note 5, supra), appellant claims that all gilsonite should be competitively leased because all reserves are known. Pruitt, however, admits that "legal restrictions imposed against gilsonite mining

on the public domain, in effect for 50 years, have accounted in large part for the lack of information on certain undeveloped gilsonite areas encountered in collecting data on the deposits and chronicaling [sic] the development of the industry." Pruitt also notes that "the Willow Creek and lower White River gilsonite fields were discovered [after 1896], and these last veins are still relatively unexplored today." <sup>11/</sup>

We do not find that appellant has demonstrated error in the Technical Mineral Report by a preponderance of the evidence. We find appellant's argument with BLM's technical conclusions to be a mere difference of opinion, and insufficient to reverse the opinions of the Secretary's technical staff. Robert E. Eckels, supra; Clear Creek Inn Corp., supra.

[6-8] Appellant argues that BLM has misapplied its own regulations to gilsonite deposits in the Bonanza area. AGC reasons as follows: "No one disputes the fact that the area for which prospecting permits have been applied is known to contain Gilsonite deposits" (SOR at 26). Since these deposits are known, 43 CFR 3550.1(d) requires that competitive leases be issued. Id. 43 CFR 3550.1(a) allows prospecting permits to be issued only to explore for gilsonite; since all gilsonite deposits in the Bonanza area are known, there is no need for exploration, and therefore no need to issue permits for such activity (SOR at 26-27).

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<sup>11/</sup> Pruitt, op. cit., at 29, 28. Willow Creek appears in the Technical Mineral Report as part of the Cottonwood lithologic sequence.

According to appellant, 43 CFR 3552.1 precludes prospecting where there is reasonable assurance of a valuable deposit of the mineral. Appellant argues that Haffner's affidavit establishes that the deposits in the Bonanza area are valuable at less than an 18-inch surface thickness. Since the veins are valuable at this width, their workability or existence cannot be questioned; therefore, appellant concludes, 43 CFR 3552.1, which provides that prospecting permits may issue for an area "where prospecting or exploratory work is necessary to determine the existence or workability of Gilsonite," is simply not germane (SOR at 26-36).

Appellant continues by arguing that even if workability is in issue, BLM has applied the wrong standard for determining whether a deposit is workable. Appellant claims that BLM's standard for determining whether a gilsonite deposit is workable is "purely economic," and that the standard should be whether it is technically feasible to mine the gilsonite (SOR at 28). In support of the contention that BLM has adopted the wrong test, appellant cites Atlas Corp., 74 I.D. 76, 84 (1967), for the proposition that "leasing need not be restricted only to those situations when the BLM can predict the deposit will be mined profitably" (SOR at 30). Appellant contends that the establishment of a surface thickness of 18 inches as the threshold for "workability," is an arbitrary standard, because surface thickness does not indicate subsurface thickness. Id.

In its decision, BLM states that the 18-inch standard is based upon technological considerations, and that it has not been informed of technical advances which justify lowering the minimum (Decision, June 10, 1987,

at 7). BLM states that the 18-inch minimum only establishes feasibility of mining, and in no way establishes profitability. Id. According to BLM, "prospecting is needed to prove workability" where surface thickness is less than 18 inches. Id. BLM has not been convinced that veins of less than 18-inch surface thickness "can be mined with a reasonable prospect of success." Id. Further, BLM relies on the technical report in determining that location in the Bonanza reserve does not guarantee a workable deposit of gilsonite in all instances. Id.

A "valuable deposit," as defined by 43 CFR 3500.0-5(i), is "a mineral occurrence where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his/her labor and means, with a reasonable prospect of success, in developing a valuable mine."

Concerning the concept of "valuable deposit," the Assistant Secretary of the Interior stated in Atlas Corp.:

[I]n determining whether lands are valuable for coal [the pertinent rules and decisions previously applied by the Department] were discussed at length in State of Utah, Pleasant Valley Coal Company, Intervenor v. Braffet, 49 L.D. 212 (1922), as follows:

\* \* \* \* \*

[I]n order to except lands from the grant to the State it must appear that \* \* \* the known conditions were such as to engender the belief that the land contained

coal of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end; \* \* \*. 49 L.D. at 28.

\* \* \* \* \*

After enactment of the phosphate permit statute, the same criteria have been considered in determining whether phosphate prospecting permits or leases are to be issued. The Department has consistently held that the Secretary is without authority to issue a prospecting permit for more detailed exploration on land where phosphate deposits are know[n] to exist in workable quantity and that it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success. Rather, it is enough that the available data is sufficient to determine that the lands under consideration would require only limited prospecting to project a program for development but would not require prospecting for the purpose of determining the presence or workability of the deposit. [Footnotes and citations omitted.]

Atlas Corp., supra at 83-84.

In Elizabeth B. Archer, 102 IBLA 308, 313-14 (1988), this Board determined that the concept of workability has an intrinsic economic component, but is not based upon the requirement of commercial success. In that case, the Board elaborated upon the standard set forth in Atlas, as follows:

BLM placed much emphasis \* \* \* on language in decisions such as Atlas Corp., supra, which declared that "it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success." \* \* \* This assertion was, and continues to be, a correct statement of law. But it does not mean, as it was apparently interpreted by BLM officials \* \* \*, that the concept of workability has no economic component. This seeming contradiction was best clarified by Office of Hearings and Appeals Director Day, sitting ex officio in James C. Goodwin, 9 IBLA 139, 80 I.D. 7 (1973). Therein, Director Day noted:

Although workability is basically a problem of the physical parameters of the coal, the test of

workability is dependent upon economic factors. If the value of the coal is greater than the cost of its extraction, the deposit is workable. It is not enough to show that mining is physically possible \* \* \*.

Workability as defined by the USGS [Geological Survey] is concerned with the economics of the intrinsic factors. Extrinsic factors such as transportation, markets, etc., are not considered. However, the cost of mining must be considered. In its classification of coal lands, USGS has anticipated and assumed the ultimate coming of conditions favorable for mining and marketing of any coal if the coal is workable in terms of the intrinsic factors. In this respect, the test of workability under the Mining Leasing Act differs from the prudent man rule under the mining laws.

The underlying assumption advanced by appellant is that all gilson-ite deposits are known and are therefore valuable. Appellant assumes that, at least in the Bonanza area, surface outcropping guarantees a valuable deposit. Appellant has argued that the 18-inch surface thickness requirement imposed by BLM as a threshold for workability is tantamount to requiring assured commercial success before a competitive lease will issue.

To accept appellant's position, however, is to ignore the concept of workability altogether. In Elizabeth Archer, supra at 314, we stated that, "quite apart from the propriety of a classification designation, no prospecting permit could properly be issued for lands which contain a deposit of phosphate which is known to be workable." (Emphasis supplied.) The regulatory scheme is thus premised upon a requirement that lands not be

designated "known," for purposes of competitive leasing until their workability has been established. Taking Haffner's testimony at its most favorable, the fact that in some instances 12-inch veins have been mined to commercial success does not establish workability of the entire lithologic sequence.

The Technical Mineral Report indicates that BLM has considered the intrinsic economic factors in the mining of gilsonite. <sup>12/</sup> This analysis is appropriate, as "[i]t is not enough to show that mining is physically possible \* \* \* [t]he cost of mining must be considered." James C. Goodwin, supra.

Goodwin provides the following comments apropos to BLM's method for determining workability:

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. Atlas Corp., supra. See Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 249 (1914). However, geologic inference, as a tool for determining workability, has certain limitations. The mere fact that lands applied for adjoin other lands which contain workable coal

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<sup>12/</sup> The mineral report, at page 3, makes the following observation:

"The continuity of width along the strike length of a mineable gilsonite vein was considered since the gilsonite may not be consistent (in width) downward in keeping with the variability of the rock types in the Cottonwood lithologic sequence. In this area the gilsonite may be mined by a method other than the conventional underground method utilized on federal leases in the Bonanza area. On these federal leases a surface pillar is left in place. In the case of the Cottonwood type depositional environment leaving such a pillar may not be economic."

deposits does not, per se, permit the inference that they contain coal deposits in workable quantity and quality. As pointed out in Atlas, supra, geologic and other surrounding conditions must lead reasonably to the inference of workability. It has been held that a coal prospecting permit may be issued for lands which adjoin other lands containing known workable deposits of coal but which themselves are not known to contain coal in workable quantity and thickness, Clarence E. Felix, A-30197 (January 7, 1965), even where there were known outcrops of coal on the application lands. [Emil Usibelli, A. Ben Shallitt, A-226277 (Oct. 2, 1951).]

Id. at 16. 13/

A determination of workability is solely within the authority of the Secretary, who is entitled to rely on the reasoned opinions of his technical experts. Absent a showing of error by a preponderance of the evidence, the Secretary's reliance upon geological data supplied by his technical expert will not be overturned. James C. Goodwin, id.; Clear Creek Inn Corp., supra. Appellant has not shown error in BLM's geological inference that an 18-inch surface thickness will be required before a vein will be considered workable. We are not persuaded by the Haffner

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13/ We are aware that Goodwin and Atlas, both supra, involved Federal coal deposits. Appellant has presented no argument justifying why the principles governing "workability" set forth in these coal dispositions would not apply equally to other minerals subject to the MLA, including gilsonite. Atlas Corp., quoted above, notes that,

"Over the years the Department has applied the same or similar criteria to the adjudication of applications for coal prospecting permits \* \* \*. The same standard determines whether leases or permits are to be issued for sodium minerals \* \* \*, and for potassium, \* \* \* under statutes authorizing the issuance only of leases and not permits, if the land is known to contain valuable deposits of sodium or potassium minerals." (citations omitted).

The opinion further refers to phosphate minerals. Id. While underlying facts may generate mineral-specific data, the concept of workability appears in the broader context of whether BLM will lease Federal mineral lands for mining, or will require exploration prior to leasing through the issuance of prospecting permits.

affidavit, nor by any other evidence submitted by appellant, that BLM's ultimate conclusions, drawn from the Technical Mineral Report, pertaining to which tracts are workable and which are not, are in error.

Finally, appellant attacks BLM's decision concerning workability of the gilsonite deposits in the Uinta Basin by arguing that since all gilsonite deposits in the Uinta are known, BLM should declare the Bonanza area a "known gilsonite resource area." Arguing that BLM has conceded this issue, AGC has quoted, in the SOR at page 37, comments from the preamble to the April 22, 1986, final rule, as follows:

The proposed rulemaking provided for all competitive leasing program for "Gilsonite" because of the assumption that all "Gilsonite" deposits were already known. Although most of the unleased Federal lands in the Uinta Basin near Bonanza, Utah, embrace known deposits of "Gilsonite," the comments received on this part indicate that there are other lands in Utah and Colorado which may contain "Gilsonite" deposits, but exploratory work is needed to determine their existence and workability. For this reason, the prospecting permit preference right lease system used in other sections of the proposed rulemaking is being reinstituted by the final rulemaking in the revised part 3550. [Emphasis in SOR.] [14/]

BLM has responded in its June 10, 1987, decision, with the following comments:

We do not agree with the AGC conclusion that BLM specifically recognized and admitted that the "Gilsonite" deposits near Bonanza, Utah are all known and that no areas in that vicinity are appropriate for prospecting permits. The general language in the preamble with respect to the implied assumption that all

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14/ Appellant does not emphasize that the comment limits known gilsonite deposits to most unleased Federal lands in the Uinta Basin.

"Gilsonite" deposits were already known was based on an overview of available surface and/or subsurface evidence. The lands recommended for prospecting do not have the surface and/or subsurface evidence available to reasonably assure the existence of a valuable deposit of "Gilsonite," (emphasis added). Consequently, further exploration is necessary to determine if valuable deposits exist.

(Decision at 8).

Once again, appellant has shown a difference of opinion with respect to BLM's characterization of gilsonite lands in the Uinta Basin, but has not shown that BLM erred in respect to individual lands. The determination whether lands contain valuable deposits of a mineral resource is solely within the discretion of the Secretary; absent showing of error, the Secretary is entitled to rely upon the technical opinions of his experts.

[9] Appellant has alleged that applications for prospecting permits filed prior to May 25, 1984, are invalid, and cannot be revived by amendment. Citing Irvin D. Bird, Jr., 73 IBLA 210 (1983), appellant claims that 43 CFR 2091.1 mandates that

applications \* \* \* must be rejected and cannot be held, pending possible future availability of the land or an interest in the land, when approval of the application is prevented by a withdrawal or reservation of lands or when the lands are classified in such a manner that the applications cannot be given effect.

(SOR at 13-14).

Our historical review of the regulatory scheme for development of gilsonite on public lands reveals that gilsonite was competitively leased until April 25, 1984, when preference right leasing was established pursuant to 43 CFR 3520.2-1(2)(a). Where duly promulgated regulations specify that lands are to be competitively leased, applications for prospecting permits must be rejected, as the Secretary is bound to follow his own regulations. Sam P. Jones, supra; Enserch Exploration Co., supra; Jack J. Grynberg, 96 IBLA 316 (1987). We thus are in agreement with appellant that applications for permits filed prior to the effective date of regulations to permit prospecting should have been rejected. Indeed, applications U-49799, U-49800, U-49801, and U-49802 filed by Hydrocarbon, on September 14, 1981, were rejected.

Hydrocarbon, however, filed nine applications for prospecting permits on December 28, 1981, while BLM's rejection of its earlier applications was on appeal. 15/ No action was taken by BLM to either accept or reject these applications until the June 10, 1987, decision awarding the permits. These nine applications were amended on May 17 and 25, 1984, to conform to the effective date of the new regulatory scheme. Other amendments to the applications were filed by Hydrocarbon on June 6, 1984. Hydrocarbon filed eight additional applications for permits on May 25, 1984. All other applications approved by BLM's June 10, 1987, decision were filed subsequent to May 25, 1984, with the exception of U-53427 and U-56217, filed by Steven A. Malnar and Julius R. Murray on July 15, 1983, and

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15/ Serial numbers for applications filed by Hydrocarbon on Dec. 28, 1981, are U-50245 through U-50253.

November 3, 1984, respectively. According to records submitted by BLM, 16/ the Malnar and Murray application filed July 15, 1983, was never amended to reflect a filing date subsequent to May 25, 1984.

Hydrocarbon, however, alleges that its premature applications were revived by amendment on May 25, 1984. Hydrocarbon correctly states that, prior to official rejection by BLM, defective over-the-counter noncompetitive oil and gas lease applications are curable by amendment, effective as of the date of the cure. See Gian R. Cassarino, 78 IBLA 242, 91 I.D. 9 (1984). As priority for obtaining prospecting permits is established in the same manner as it is for over-the-counter noncompetitive lease offers, we find that all premature applications amended on or subsequent to May 25, 1984, were cured, and became effective when filed. As the record does not reflect that the Malnar and Murray application U-53427, filed July 15, 1983, was amended, this application is void.

Finally, the record does not indicate whether applications were filed by other prospectors which might have priority over the amended applications for lands embraced by Hydrocarbon applications U-50245 through U-50253. To the extent that other applications may have been filed on May 25, 1984, prior to Hydrocarbon's filing of amendments, the Hydrocarbon applications should be rejected. See Beard Oil Co., 105 IBLA 285 (1988). To the extent the time of filing cannot be determined, BLM should treat

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16/ All information concerning dates of original filings and amendments is taken from the BLM record, "Gilsonite Prospecting Permit Applications."

such applications, if there are any, as simultaneously filed. See 43 CFR 1821.2-3.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for further action consistent with this opinion.

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Franklin D. Arness  
Administrative Judge

## ADMINISTRATIVE JUDGE HUGHES CONCURRING:

While in full agreement with Judge Arness' opinion, I am writing separately to voice my views on two points.

First, it should be noted that Hydrocarbon Mining Company (Hydrocarbon) did file its answer on January 15, 1988, within the time allowed by us by order dated December 2, 1987. Hydrocarbon had entered its appearance on November 19, 1987, and, at the same time, requested an extension of time until January 15, 1988, to file its answer. Subsequent to the granting of the additional time, American Gilsonite Company (AGC) filed both a strenuous objection to granting an extension and a motion to disregard the answer, arguing that Hydrocarbon's request for extension was itself filed out of time. <sup>1/</sup> However, by order dated December 23, 1987, we expressly overruled AGC's objection and its motion to disregard and decided to consider the answer, when filed. The present decision correctly reconfirms that order.

It is within our authority, under the general provisions regarding filing of documents in the Office of Hearings and Appeals, to grant requests for extensions of time to file pleadings. 43 CFR 4.22(f). Although, under these general rules (43 CFR 4.22(f)(2)), such requests are expected to be filed within the time allotted for filing the pleading, the rule specifically governing the filing of answers with the Board of Land Appeals (43 CFR 4.414) gives the Board discretion in determining whether or not to disregard

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<sup>1/</sup> AGC's objection to granting the extension crossed in the mails with our order dated Dec. 2, 1987, granting the extension.

an answer that is not filed within the time allotted. 2/ The specific regulation governing answers properly controls here.

Our decisions to allow Hydrocarbon to file an answer and to consider that answer (even though the time provided for so doing might have expired without its having requested an extension of time 3/) were a proper exercise of the discretion granted to us under 43 CFR 4.414. The interests of judicial economy are served by allowing full consideration of issues in adjudication at the Departmental level, and it is therefore appropriate for us to allow full exposition of opposing views in a dispute. In view of the length of time that an appeal is presently before the Board before it is reached for consideration, the practice of liberally granting extensions to file answers does not delay resolution of disputes.

Second, the Board is generally bound to follow duly promulgated regulations of the Department, and it is only in very rare circumstances that a regulation is not binding because it is not "duly promulgated" due to lack of authority for it. Such is clearly not the case here, and I wish to add my comments to those of Judge Arness in ruling that the regulation is binding.

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2/ The Board also enjoys discretion as to whether or not to accept an untimely statement of reasons. 43 CFR 4.402, 4.412(c); Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); James C. Mackey, 96 IBLA 356, 94 I.D. 132 (1987).

3/ The question of when the time for Hydrocarbon to prepare an answer began to run is in dispute. In view of our decision to accept the answer, even if the extension were not timely filed, it is unnecessary to resolve this question.

Various sections of the Mineral Leasing Act (MLA) <sup>4/</sup> specify particular methods for leasing minerals other than vein-type solid hydrocarbons. Thus, coal (30 U.S.C. §§ 201 (1982)) and oil (30 U.S.C.A. § 226 (West Supp. 1989)) are generally leased only by competitive bidding, while sodium (30 U.S.C. §§ 261 through 263 (1982)), sulphur (30 U.S.C. §§ 271 through 276 (1982)), and potash (30 U.S.C. §§ 281 through 287 (1982)) are subject only to a prospecting permit/preference-right lease system. Significantly, the MLA does not specify a method of leasing for vein-type solid hydrocarbons, including gilsonite. 30 U.S.C. § 241 (1982). Instead, it leaves the matter to the discretion of the Secretary, who is expressly authorized to lease gilsonite "under such rules and regulations, not inconsistent with this chapter, as he may prescribe." Although some specific restrictions are placed on leasing (e.g., acreage limitations and rental rate), nowhere in the chapter is any specific leasing system described. Thus, by its own terms, the MLA imposes no restriction on the method of leasing and gives the Department broad authority to adopt a leasing system for gilsonite and other vein-type solid hydrocarbons.

Congress, in the MLA, gave the Department substantial authority over mineral leasing, including even the authority to cancel leases administratively in some circumstances, which authority may be exercised until

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<sup>4/</sup> Originally known as the Mineral Lands Leasing Act of 1920, the grant of authority to the Department of the Interior to lease certain minerals has been repeatedly amended. Over the years, this authority had been referred to as the Mineral Leasing Act, and Congress formalized the use of this name in section 5113 of the Federal Onshore Oil and Gas Lease Reform Act of 1987 (FOOGLRA), 101 Stat. 1330-263. The Mineral Leasing Act, in its present form, including the amendments wrought by FOOGLRA and CHLA is found at 30 U.S.C.A. §§ 181 through 287 (West 1986 and West Supp. 1989).

Congress withdraws it. See Boesche v. Udall, 373 U.S. 472, 482-83 (1963). Section 21(a) of the MLA, 30 U.S.C. § 241(a) (1982), was most recently amended by the Combined Hydrocarbon Leasing Act of 1981 (CHLA), 95 Stat. 1070-72. The extent of the authority granted to the Department by section 21 to issue leases under such rules and regulations as it might prescribe was not altered by CHLA. Compare, 30 U.S.C. § 241(a) (1976) (which was generally unaltered by CHLA, except to remove tar sands to section 18 and to clarify that oil shale and gilsonite are covered by section 21). Thus, Congress has not withdrawn the Secretary's discretion to elect how to lease gilsonite, but has continued to defer to it. 5/

The Department's present regulations, which establish a dual system for oil shale and gilsonite involving both prospecting permit/preference right leases and competitive leases, 43 CFR 3550.1, do not conflict with the statutory grant of authority under section 21 of the MLA. Significantly, section 21 does not specify that the Secretary must lease oil shale and gilsonite only competitively, or that he must use only a prospecting permit/preference-right lease system, or that any specific method should be used. Rather, it leaves the method to be chosen to the discretion of the Secretary, through the promulgation of such rules and regulations as he may prescribe. Since the regulations promulgated by the Department are plainly

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5/ Prior to removal of the tar sand areas from section 21 of the MLA, the Department exercised its discretion to issue noncompetitive leases for tar sands area, even though section 21 of the MLA, 30 U.S.C. § 241 (1976) (which governed tar sands prior to CHLA), did not specifically grant the Secretary the authority to do so. See Daniel A. Engelhardt, 61 IBLA 65, 66 (1982); 46 FR 6077-78 (Jan. 21, 1981), 45 FR 76800-01 (Nov. 20, 1980).

consistent with the statute, we are plainly obliged to affirm BLM's decision to apply them. 6/

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David L. Hughes  
Administrative Judge

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6/ As pointed out by Hydrocarbon in its answer, if we accepted the logic of AGC's argument that prospecting permit/preference-right leases may not be issued because they are not expressly authorized by 30 U.S.C. § 241(a) (1982), it would also follow that competitive leases (which AGC favors) could not be issued, because they, too, are not expressly authorized.